Abdul Salam bin Mohamed Salleh v Public Prosecutor

HIGH COURT (SINGAPORE) — CRIMINAL MOTION NO 60 OF 1989
CHAN SEK KEONG J
1 MARCH 1990

Criminal Procedure — Questions of law of public interest — Finality of proceedings — Supreme Court of Judicature Act (Cap 322, 1985 Ed), s 60

Evidence — Documents other than record of appeal — Taking cognizance of by appellate court

The accused was convicted for an offence under s 201 of the Penal Code in the subordinate courts. His appeal having been dismissed by the High Court, the accused applied under s 60 of the Supreme Court of Judicature Act (Cap 322, 1985 Ed) ('the Act') to have eight questions of law of public interest referred to the Court of Criminal Appeal.

Held, referring four questions for the decision of the Court of Criminal Appeal:

(1) Even if a question satisfies all the prescribed conditions of s 60 of the Act, the High Court still had the discretion whether or not to refer a question to the Court of Criminal of Appeal, where it is invoked by a party other than the public prosecutor.

(2) The public interest in giving a convicted person the right to have his conviction corrected on appeal has to be balanced against the public interest that there has to be finality in the proceedings.

(3) Section 60 of the Act was not an ordinary appeal provision to argue points of law which are settled or novel points which can be decided by the application or extension of established principles of law or the application of statutory provisions which have been authoritatively construed by higher courts. The provision should be invoked sparingly.

(4) The question of whether a certified record of a trial should be allowed to be corrected and to what extent, was an important issue pertaining to the administration of justice and could be said to give rise to public concern as to the integrity of the judiciary.

(5) The failure of the trial judge to explain an entry in the record which never took place is an issue of law of public interest as it relates to the way in which criminal trials are conducted.

(6) There being no local authority on the disappearance of evidence and what constitutes the same, this question was also referred to the Court of Criminal Appeal as it was a question of law on which depended the conviction of the accused for a grave offence.

Cases referred to

1 *Haw Tua Tau* v *PP* [1981] 2 MLJ 49 (refd)
2 *Tan Yin Yen* v *PP* [1976] 2 MLJ 143 (folld)
3 *A Ragunathan* v *Pendakwa Raya* [1982] 1 MLJ 139 (refd)
4 *Cecil Rajah* v *PP* [1981] 1 MLJ 147 (refd)
5 *Nunis* v *PP* [1982] 2 MLJ 114 (refd)
6 *Wong Hong Toy & Anor* v *PP* [1986] 1 MLJ 453 (refd)
7 *Wong Hong Toy & Anor* v *PP* (Criminal Motion No 59 of 1986) (unreported) (refd)
8 *JB Jeyaretnam* v *Law Society* [1988] 3 MLJ 425 (distd)
9 *Goh Teng Lok* v *R* [1939] MLJ 309 (refd)

Legislation referred to

Supreme Court of Judicature Act (Cap 322, 1985 Ed) s 60

Mohideen MP Haja Rubin for the applicant.
Bala Reddy for the Public Prosecutor.

Cur Adv Vult

Chan Sek Keong J: On 5 October 1989, I delivered judgment in Magistrate's Appeal No 185 of 1987 dismissing an appeal by the appellant (who was an investigator of drug offences at the Tanglin Police Station) against his conviction for an offence under s 201 of the Penal Code. The district judge had found that the appellant had caused evidence (an admissible statement (P4) made by Razali under s 120 of the Criminal Procedure Code ('the CPC') of the commission of an offence by one Razali bin Bakar confessing to possession of cannabis) to disappear by not including P4 in the investigation papers file.

In this motion which is made under s 60 of the Supreme Court of Judicature Act (Cap 322, 1985 Ed) ('the SCJA'), counsel for the appellant has applied for an order that the following questions which, he claims, are questions of law or public interest (and which have arisen in the course of Magistrate's Appeal No 185 of 1987 and the determination of which affected the event of the appeal) be reserved for the decision of the Court of Criminal Appeal:

(1) whether the conviction of the appellant can be sustained on a record that cannot be relied on in its original form;
(2) whether in the proper exercise of judicial discretion, the court can take cognizance of extraneous correspondence (ie letters exchanged between the Registrar of the Subordinate Courts and the trial judge) which formed no part of the record? Alternatively whether there was legal power in the court to take cognizance of documents other than the record;
(3) whether a magistrate or district judge could add, supplement, clarify or correct his written grounds of decision after a complaint had been lodged in the petition of appeal as to the propriety of the record and the grounds;
(4) whether such additions, supplements, clarifications or corrections could be done by way of letters;
(5) whether the failure by the trial judge to explain as to how he had come to record a purported application by the DPP whilst in fact there was none [such failure read with the trial judge's earlier explanation to the court in his letter dated 18 June 1988 where he said that: 'from the notes of evidence and my grounds of decision it is quite clear that at the conclusion of the prosecution case, I had in mind amending the charge from one under s 201 to one under s 204 of the Penal Code (Cap 103, 1985 Ed)], contravenes the principles of fair hearing, ie justice must be manifestly seen to be done;

(6) whether the aforesaid failure by the trial judge is or is not a relevant question for the determination of the appeal;

(7) whether the direction by the learned trial judge as encapsulated by me at pp 18 and 19 of my grounds of decision [ie that 'the trial judge did not proceed on the basis that he preferred the evidence of Razali to that of the appellant and of DW2. He proceeded on the basis that the appellant, as the investigating officer, had to explain why he did not include P3 in the IP as was his duty to do so as an investigating officer.' ... 'The appellant was convicted because he could not give a satisfactory reason for not including P3 in the IP.'] runs counter to and is in conflict with the well-established tenet of law that it is for the prosecution to prove its case beyond reasonable doubt and whoever has the function of deciding facts at the trial of a criminal offence should keep an open mind and assess to what extent (if any) that witness's evidence has been confirmed, explained or contradicted by the evidence of other witnesses — *Haw Tua Tau* v *PP*[1] at p 51 letters H and I;

(8) in the light of the averment in the charge that the accused 'caused the evidence of the offence to disappear *by deliberately not enclosing the statement*' (emphasis added),

(i) is not 'deliberateness' an essential element to be proved by the prosecution;

(ii) what is the meaning of the word 'disappear'; and

(iii) can it be said that the evidence in this case did not disappear particularly when it has been kept by the accused in his office drawer and produced to the authorities when asked about it.

The DPP has submitted that none of these questions of law is of public interest and that this application is an attempt to appeal against a conviction which has been finally determined under the law.

The relevant provisions of s 60 of the SCJA are as follows:

> (1) When an appeal from a decision of a subordinate court in a criminal matter has been determined by the High Court, the judge may on the application of any party and shall on the application of the public prosecutor reserve for the decision of the Court of Criminal Appeal any question of law of public interest which has arisen in the course of the appeal and the determination of which by the judge has affected the event of the appeal.
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> ...
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> (5) For the purposes of this section but without prejudice to the generality of its provisions —
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> (a) any question of law regarding which there is a conflict of judicial authority shall be deemed to be a question of public interest; and
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> (b) the reservation of a question of law for the consideration of the High Court under the provisions of any written law relating to criminal procedure or the exercise by the High Court of any power of revision under any such written law shall be deemed to be an appeal from a decision of a subordinate court in a criminal matter.

It is plain from the terms of the provision that even if a question satisfies all the prescribed conditions, the court has discretion whether or not to refer it to the Court of Criminal Appeal, where it is invoked by a party other than public prosecutor.

The relevant condition to be met is whether the questions were of public interest. What is a question of law of public interest? Counsel for the appellant has referred me to a number of authorities decided under s 60 and the corresponding s 66 of the Malaysian Courts of Judicature Act 1964 ('the CJA').

In *Tan Yin Yen* v *PP*,[2] the Federal Court of Malaysia refrained from answering the question referred to it by the High Court (the question being whether the magistrate had properly exercised his discretion in making an order of confiscation of a fishing vessel and net under s 16(1) of the Fisheries Act 1963) on the ground that the public prosecutor had agreed that the forfeiture was wrong. However, Suffian Ag CJ in his oral judgment said:

> It is to be observed that questions of law which may be referred to us under s 66 should not be questions that are of personal interest only to the accused or the public prosecutor, but should be questions that are of *public* interest, and it seems to us better if the High Court were to exercise their discretion under s 66 sparingly, so that the references are not used as an indirect way of appealing against matters that under the law have been finally determined by the High Court. (Emphasis of court.)

In emphasizing the word 'public', his Lordship seemed to be suggesting that the relevant question of law was not of public interest. On the other hand, he might have meant that although the question of law was one of public interest, the High Court should have exercised its discretion sparingly in order that that procedure should not be used as a means of appeal. This judgment throws little light on what is a question of law of public interest.

In *Ragunathan* v *Pendakwa Raya*,[3] Raja Azlan Shah Ag LP delivered a more substantial judgment on the issue. The question in that case was whether the appellant was a 'public officer' within the meaning of that expression in s 18(1) of the Public Service Tribunal Act 1977. He was charged for the offence of communicating with the press in regard to proceedings of the tribunal and his defence was called. The questions were:

> (1) What ingredients must the respondent prove to establish a prima facie case in a prosecution against a defendant on a charge under s 18(1) of the Public Service Tribunal Act 1977 read with para 7 of the Schedule to the said Act?
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> (2) In a prosecution under s 18(1) of the Public Service Tribunal Act 1977, is it sufficient for the respondent to

establish that a defendant is a public officer within the meaning of the said Act by leading evidence to show that he (the defendant) is a member of a trade union consisting of government servants?

His Lordship said (at pp 141 and 142):

> But it is not sufficient that the question raised is a question of law. It must be a question of law of public interest. What is public interest must surely depend upon the facts and circumstances of each case. We think that the proper test for determining whether a question of law raised in the course of the appeal is of public interest would be whether it directly and substantially affects the right of the parties and if so whether it is an open question in the sense that it is not finally settled by this court or the Privy Council or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles in determining the question are well settled and it is a mere question of applying those principles to the facts of the case the question would not be a question of law of public interest.
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> It was urged upon us that in at least two previous cases (see *PP* v *D'Fonseka* [1958] MLJ 102; *Yap Ee Kong* v *PP* [1981] 1 MLJ 144) the applicants had successfully obtained a reference, and that we should follow those cases and determine the questions referred to us. It was further said that the questions are of general importance upon which further argument and a decision of this court would be to the public advantage (see *Buckle* v *Holmes* [1926] 2 KB 125). A short answer is that the two cases referred above involved misdirections in law and this court had no hesitation to intervene because they called for discussion of alternative views. There are no two views about the present case.
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> But basically, we must consistently decline to receive and answer questions which though they may be questions of law are nevertheless not questions of law of public interest, in the sense as we understand it, that a necessity arises for the determination of the questions having regard to the uncertain or conflicting state of the law on the subject: see s 66(6)(a) Courts of Judicature Act 1964.

In the event, the court declined to answer the questions following the reason given by the same court in *Cecil Rajah* v *PP*[4] (ie that it was more convenient for the court to 'consider such points of public importance' after the High Court had dealt with them and given the benefit of its views).

In *Nunis* v *PP*,[5] the question of law related to the meaning of the expression 'or other advantage' in s 2(2) of Act 22 of 1970 which the High Court judge had construed widely, following two previous Federal Court decisions. The Federal Court refused to grant leave. Raja Azlan Shah CJ (Malaya), in delivering the judgment of the court, said:

> For leave to be granted, it is necessary that the question posed is a question of law raised in the course of the appeal to the High Court and is of public interest. I have in delivering the judgment of this court in *Ragunathan* v *Pendakwa Raya* [1982] 1 MLJ 139 dealt with the test for determining what amounts to a question meeting the requisite factors for the purposes of s 66 of the Courts of Judicature Act 1964, and I made it clear that if it is a mere question of principles, which in the matter before us only involve the construction of certain words in a statutory provision in their application to the facts of the case, the question would not be a question of law of public interest.

In *Wong Hong Toy & Anor* v *PP*,[6] the applicants raised the following issues for decision by the Court of Appeal under s 60 of the SCJA:

(i) Magistrate's Appeal Nos 8 and 9 of 1984

- (a) whether the declaration by the respondents was a declaration within the scope and meaning of s 199 of the Penal Code;
- (b) whether Mr Daljit Singh was authorized by law to receive the said declaration from the respondents.

(ii) Magistrate's Appeal Nos 11 and 13 of 1984

- (a) whether the property in the cheques for $2,000 and $200 was in the Workers' Party before the cheques were negotiated;
- (b) on who was the onus to prove the property of the cheques in the Workers' Party and whether such onus was discharged by the party on who it lay on the whole of the evidence adduced before the court;
- (c) whether the said onus shifted at any time from one party to the other, alternatively whether there was any onus on the respondents at any stage of the trial to prove that the property in the said cheques was not in the Workers' Party;
- (d) whether on the whole of the evidence adduced before the court the prosecution had discharged the onus on it to satisfy the court that the respondents fraudulently transferred the property in the said cheques assuming the property in the said cheques was in the Workers' Party;
- (e) whether the High Court was right and justified on well established principles of law in disturbing the very careful findings of fact made by the trial judge before acquitting the respondents on the charges.

(iii) Magistrate's Appeal Nos 14 and 15 of 1984

- (a) whether the property in the cheque for $400 remained with the Workers' Party after the end of May 1982 and in particular was it so on 2 July 1982 when the proceeds on the cheque were realized;
- (b) whether the whole of the evidence adduced before the court was capable in law to support the finding of a common intention between the appellants.

The Chief Justice held that the said questions were questions of fact, but that if they were questions of law, they were not questions of law of public interest. The applicants appealed to the Court of Criminal Appeal which held that there was no right of appeal in the matter: see *Wong Hong Toy & Anor* v *PP*.[6] The applicants then petitioned the Privy Council for special leave to appeal to the Privy Council. Leave was refused on 6 March 1986.

In *Wong Hong Toy & Anor* v *PP*,[7] the same applicants raised, again unsuccessfully, for any of the following issues for determination by the Court of Criminal Appeal:

(a) whether it is necessary for the purposes of s 199 of the Penal Code that a 'declaration' therein referred to must be in such a form that it is capable of standing on its own as a piece of evidence and is receivable by the court as evidence of the facts within it without being appended to any other document. In other words is it necessary for the declaration to be in such a form that it is receivable as evidence of the facts contained within it as though the maker of the declaration had himself gone into the witness box and given evidence on oath?

(b) whether the declaration in the instant case (ie P13A) which was not a statutory declaration, which was not on oath and did not contain within it any of the solemn words which could in any way enable it to stand on its own feet as an admissible document, was not fatal to the argument that it could be described as a 'declaration' within s 199;

(c) whether on the interpretation of the relevant legislative provisions, Daljit Singh could have been regarded as a Commissioner for Oaths at the material times?

(d) whether the requirement under the Rules of the Supreme Court 1970 that verification of accounts should be by affidavit can in any way be said to have been fulfilled in this case with regard to the Workers' Party's accounts;

(e) whether, as a matter of law, it is possible to say, in any event, that any rules of the Supreme Court which are in themselves procedural provisions, can abrogate or change the effect of a statute;

(f) whether the fact that it is required procedurally for a deponent such as a receiver to give the grounds for stating what he believes 'to the best of his knowledge and belief' in any way make any document which is simply evidence of the document's belief admissible in its own right?

(g) whether if it is intended or desired that any statement made in any declaration and annexed to any affidavit on grounds 'to the best of my knowledge and belief' if it is thereafter to be submitted as evidence of the facts within it in his own right should not also be supported by an affidavit of those who made the declaration?

(h) whether it is competent for the High Court sitting in an appellate jurisdiction in a criminal appeal from a subordinate court to pass a sentence which the subordinate court was not competent to pass at the time sentence was pronounced;

(i) whether an appellate court can vary the sentences of a lower court outside the principles set out by the provision of s 260 of the Criminal Procedure Code and the authorities thereon on the matter;

(j) whether before a conviction under s 199 of the Penal Code can be made it is incumbent upon the prosecution to show knowledge on the part of the declarants that the declaration would be used in the manner and for the purpose set out in the section and whether this requirement has been satisfied in the present case upon the evidence before the court.

Lai Kew Chai J considered that questions (a), (b), (e), (f) and (g) were in substance the same as question (i) in Criminal Motion No 23 of 1985[6] and held that they were not questions of law of public interest. His Lordship's reasoning is as follows:

> In my judgment none of the five questions ... is a 'question of law of public interest' .... Both the learned Chief Justice and I have decided that the joint declaration made by the applicants in circumstances under which they knew or ought to know that it would be and was in fact tendered in the interlocutory receivership proceedings was a 'declaration' within s 199 of the Penal Code which the assistant registrar was 'authorized by law (ie by O 41 r 5(2) of the Rules of Supreme Court 1970) to receive as evidence' touching on a material point. There is within our jurisdiction no divergence of judicial opinion in the High Court on this issue. That there is judicial agreement between the learned Chief Justice and I is due to the fact that there is and can be no room for an alternative view on the law bearing on this issue and the application of the facts in this case to the law.
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> As for the contention that 'there is a good deal of authority which are generally in favour of the (applicants)', this contention is not correct at all. I invite attention to my analyses of the cases in my judgment delivered yesterday. I had distinguished the four cases cited by Lord Hooson. So far as *Baban Singh*'s case is concerned, I had amply demonstrated that the ratio decidendi of that case is that a declaration falling within s 199 is not required to be under oath or affirmation. The only conditions are: (i) that it is a voluntary declaration; (ii) that the law authorized its reception as evidence of a fact in issue; and (iii) that the maker knew or ought to know that it will be and is tendered as evidence touching on any point material to the object for which the declaration is made or used.
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> Accordingly, the applicants are unable to come within the presumption under s 60(5) of the Act, the relevant parts of which provide as follows:
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> For the purposes of this section but without prejudice to the generality of its provisions —
>
> (a) any question of law regarding which there is a conflict of judicial authority shall be deemed to be a question of public interest; ...'

On the remaining questions, Lai Kew Chai J held that question (d) had no relevance; that question (c) was also not relevant as the validity of the appointment of Mr Daljit Singh as Commissioner for Oaths could not affect the outcome of the appeal, that question (j) was not in dispute, but that knowledge on the part of the applicants had been proved, that question (h) was not relevant as he had not intended to pass a sentence which the lower court had no jurisdiction to pass and that question (i) did not raise any disputed point of law as there was a long line of authorities which justified his decision to vary the sentence.

However, in *JB Jeyaretnam* v *Law Society of Singapore*,[8] the Privy Council took the opportunity to give their views on the meaning of s 60 of the SCJA. Their Lordships said (at p 432):

> The conviction of the appellant on the accounts charge depends on a construction of s 199 of the Penal Code first propounded by the Chief Justice sitting as a single judge and later adopted by Judge Foenander and Lai Kew Chai J, which

is attacked as bad in law. The convictions on the $2,000 and $200 cheque charges depend on findings of fact by the Chief Justice reversing the primary findings of the trial judge on grounds which are attacked as bad in law. The affirmation by the Chief Justice of the conviction by Judge Khoo of the $400 cheque charge is attacked as bad in law. The appellant has had no opportunity to test any of the questions of law which he claims are involved by appeal to the Court of Criminal Appeal of Singapore or, if necessary, by further appeal to the Board, because the Chief Justice and Lai Kew Chai J refused to reserve any questions of law pursuant to s 60 of the Supreme Court of Judicature Act and, in the absence of such reservation, neither the Court of Criminal Appeal nor the Board had any jurisdiction to entertain any appeal. If it can be shown that there were questions of law of public interest which should have been reserved for decision by the Court of Criminal Appeal and that this would have led to the quashing of the convictions either by the Court of Criminal Appeal or on appeal by the Board, it must surely be appropriate, to quote Lord Simon's words 'that the conviction(s) should not be conclusive against the accused in the course of disciplinary proceedings, the object of which themselves is, after all, to promote justice'.

Their Lordships have from the outset entertained no doubt that these convictions do indeed raise serious questions of law and they find it difficult to understand how any serious question of law arising in a criminal case on which a person's conviction of a grave offence may depend can be said not to be 'of public interest' within the meaning of s 60(1) of the Supreme Court of Judicature Act. In the end, therefore, the determination of the appeal turns on the question whether the convictions are vitiated by errors of law.

It is to be noted that the views of the Federal Court of Malaysia on the corresponding section were not considered by the Privy Council, presumably because the relevant decisions were not cited. The test laid down by the Privy Council as to when a question of law is of public interest, ie 'any serious question of law ... on which a person's conviction of a grave offence may depend', is not easy to apply, if only because of its uncertain ambit. What is a *grave* offence as distinguished from any other offence? From the case itself, we can deduce that any offence which carries a sentence of imprisonment is a grave offence, as Jeyaretnam was sentenced to one month's imprisonment on one of the charges. He was also fined on one charge in an amount which disqualified him from being a Member of Parliament. Does potential disqualification from holding a public office make an offence grave? Is the test of gravity related to the standards of morality or conduct of Singapore society or to the individual's own standing in society or both? The gravity of an offence is not necessarily commensurate with the gravity of its consequences to the person who has been convicted of such offence.

What is a *serious* question of law as distinguished from any other question of law? The ambit of this requirement is also uncertain as the Privy Council have not given any guidelines, beyond stating that the convictions against Jeyaretnam raised serious questions of law. What were these questions of law?

On the accounts charge under s 199 of the Penal Code (ie making a false declaration in relation to the accounts), the question was whether the declaration signed by Jeyaretnam was a declaration within the terms of s 199 of the Penal Code. The Privy Council held that there was no ambiguity about that section, that 'what is required is a declaration which is per se admissible 'as evidence of any fact', that the declaration made by Jeyaretnam, not being a statutory declaration was not per se admissible of the facts stated therein, although it was receivable in evidence.

With respect to the charges on the $2,000 cheque and the $200 cheque, on both of which the Chief Justice reversed the trial judge's decision, the Privy Council held that the trial judge's decision was based on findings of fact and that the Chief Justice in setting out to controvert the findings of fact on the central issue as to the circumstances in which the donor had altered his cheque to make it payable to bearer, had exceeded his proper function as an appellate judge and had thereby committed a *serious error of law* which vitiated his decision.

With respect to the charge on the $400 on which Jeyaretnam was convicted by the trial judge, the question of law was whether the drawer was entitled to withdraw his cheque or change the donee whilst the cheque was still in the possession of Jeyaretnam. The Privy Council, after stating that 'this was perhaps the simplest case of all and here it was the trial judge who fell into error probably because the right point was never clearly taken', held that there was an imperfect gift of the cheque, and therefore the donor could withdraw it at any time, and was on the evidence withdrawn because he did not want the proceeds to go to the receiver for the creditors of the Workers' Party.

The question of law common to the three cheques was whether the property in them had passed to the Workers' Party at the time the cheques were altered by the donor or dealt with by Jeyaretnam with the consent of the donor. The Privy Council held that the property in the cheques had never vested in the Workers' Party as, until they were presented for payment or negotiated to a third party, each of them was nothing more than a revocable mandate to the drawer's bank to pay the amount shown and a revocable promise to the donee that the amount would be paid. Accordingly, the drawer could change the mandate and the promise at any time before it was acted upon. The reason why the lower courts went wrong on this question of law was that, according to their Lordships, 'it is fair to all concerned to point out that these important considerations do not appear to have been fully appreciated at any stage in the criminal proceedings or to have been adequately formulated in argument until the matter reached the Board.'

It can thus be seen that of the questions of law considered as serious by the Privy Council, two of them

concerned substantive principles of law: (i) the gift cheque as a revocable mandate, which was the 'simplest of all', and (ii) the legal nature of a declaration under s 199 of the Penal Code, which turned on the fine distinction between a declaration that is admissible *as* evidence of the facts stated therein and one that is admissible *in* evidence but not of the facts stated therein. The other two questions of law concerned (iii) the proper role of an appellate court in regard to findings of fact by a trial judge.

The word 'serious' used in relation to ideas and concepts connotes the quality of weightiness, complexity and importance and requiring or deserving careful and thoughtful consideration. Except for point (ii) which was conceptually a subtle and therefore difficult point, the other points were not serious in the above sense as point (i) was held to be simple, and point (iii) is settled law.

In regard to point (iii), it was, of course, open to argument that the Chief Justice's approach was wrong, and, in the event, the Privy Council held that the Chief Justice committed a serious error of law. However, the word 'serious' in this context means no more than that it made the difference between an acquittal and a conviction. But, it should be noted, that this kind of questions of law, by its nature, can only be raised in relation to a particular case. It is of no public interest. It was of personal interest to Jeyaretnam in each case.

In Singapore, the majority of criminal cases are tried in the subordinate courts. The normal recourse available to a convicted person who is dissatisfied with his conviction and/or the sentence is to appeal to the High Court. It is in the public interest that a person who has been wrongly convicted of any offence (and not only a grave offence), whether by the wrong application of the law or the application of the wrong law, should be able to have it corrected on appeal. Such a right is provided under existing law, but it does not go beyond the High Court. The public interest in giving a convicted person the right to have his conviction corrected on appeal has to be balanced against the public interest that there has to be finality in the proceedings, and Parliament has decided as a matter of policy that finality in criminal cases tried in the subordinate courts stops at the High Court. Parliament has set the balance by giving a limited right of appeal in such cases rather than to allow them to go all the way to the Privy Council. However, Parliament has also recognized that there are certain questions of law which should be settled by the Court of Criminal Appeal as it is in the public interest that they should be so settled. It is doubtful that s 60 was designed to refer for decision by the Court of Criminal Appeal questions which by their nature cannot affect the outcome of cases other than those from which they arose.

It is on these considerations that the courts in Malaysia and Singapore have recognized the limitations of s 60. It is not an ordinary appeal provision to argue points of law which are settled or novel points which can be decided by the application or extension of established principles of law or the application of statutory provisions which have been authoritatively construed by higher courts. Hence, Suffian Ag CJ's caution that the provision be used sparingly lest it be made use of as an appeal provision.

I turn now to the questions before me and the submissions of counsel for the appellant and of the DPP.

Questions (1) to (6) can be taken together. It is common ground that the certified copy of the record of the trial transmitted to the appellant pursuant to s 249 of the CPC contained the following entry:

> DPP: Applies under s 163 CPC to amend charge under s 204 Penal Code.
> Court: Defence called on *amended* charge. (My emphasis.)
> Two courses explained to accused in ordinary language.
> Elects to give evidence from the witness box.

It was common ground that the DPP did not at any time apply to amend the charge. In the course of the appeal the DPP produced the correspondence between himself and the district judge in which the district judge gave two inconsistent explanations for the existence of the entry in its typed form. The second explanation was supported by the contents of a xeroxed copy of the manuscript notes of the district judge which I found sufficiently legible to read the word typed as 'amended' in the record as 'original' in manuscript. For this reason, and upon analysing the notes of evidence, I concluded that the district judge had convicted the appellant on the original charge and not on an amended charge. I accepted the comment that the district judge had not explained how he came to make the entry relating to the application by the DPP to amend the charge when no such event had taken place, but for reasons I have given, I came to the conclusion that no miscarriage of justice had occurred.

In this application, counsel for the appellant informed me that at the hearing of the appeal he had objected to the admissibility of the correspondence between the district judge and the DPP and of the xeroxed copy of the manuscript notes. He submitted that I should have never looked at these documents and should have heard the appeal on the basis of the record transmitted under s 249 of the CPC. During the hearing of the appeal, I did not understand counsel to have objected to my looking at the said documents to determine whether there was any basis for the trial judge's second explanation. The reason for my understanding was that his argument was that the record could not be supplemented or added to which was not what I had done. However, for the purpose of this application, I am prepared to accept that an objection of this nature was made. But, even on that basis, I do not see how this objection can be a question of law of public interest.

The objection is a procedural objection (that an affidavit should have been filed, referring to *Goh Teng Lok* v *R*[9]) and not a substantive objection that the documents were not admissible at all. If I had been fully aware of the nature of counsel's objection, I would have given directions to ensure compliance with the correct procedure. There was and is no suggestion that the xeroxed manuscript was not genuine or that the word 'original' is not legible or written there.

There is, I think, a question of law of public interest in the second part of question (2) in regard to the legal status of a certified record of the trial and the powers of an appellate court to take cognizance of documents other than the certified record. By this, I do mean or refer to attempts to supplement the record or to put in material which the trial judge had omitted from the record or which, whilst in the record, he had never brought into consideration. What I have done in this case was to refer to extraneous documents to correct what was obviously a typographical error in the certified record. This error would never have occurred if the manuscript record had been xeroxed in its entirety and signed by the trial judge. For this reason, I hold that the first part of question (2) and questions (3) and (4) are not relevant. But, I think that a higher court should consider the question whether a certified record should be allowed to be corrected and to what extent. It is an important issue pertaining to the administration of justice. If a trial record certified by the trial court (presumably as correct in all respects) could be corrected, it might be said to give rise to public concern as to the integrity of the judiciary or the judicial process. In the present case, the error happened to be one that could have been construed in favour of the appellant, but supposing the error could be construed in favour of the prosecution, what then?

I am also of the view that questions (5) and (6) relating to the unexplained entry is an issue of law of public interest as it relates to the way in which criminal trials are conducted. The existence of such an entry not only created a grievance in the mind of the appellant that he might not have received a fair trial but a public concern on errors of this nature. The suggestion could be made that by reason of the entry the trial judge had not been paying attention to the proceedings. If this were a probable inference, then the question would arise whether it was sufficient to vitiate the conviction.

With respect to question (7), I think that the words taken from my judgment and referred to therein do not nor were they intended to run counter to the tenet that it is for the prosecution to prove its case beyond reasonable doubt or that it is contrary to direction in *Haw Tua Tau*.[1] Those words should be read in the context of pp 17, 18 and 19 where I considered the submissions of counsel for the appellant. However, if it were otherwise, as contended by counsel, then I have made a serious error of law which would vitiate my affirmation of the conviction of the appellant on a grave offence. Notwithstanding this but for the views of the Privy Council, I would not have been prepared to refer this question to the Court of Criminal Appeal.

As regards question (8), the disappearance of the evidence is an essential ingredient of the offence. The appellant had taken two statements (P3 and P4) from Razali. He put P3 (which was inculpatory in nature) in his drawer and P4 (which was exculpatory in nature) in the investigation papers file. He then made a recommendation that Razali be charged for consumption of morphine but not also for possession of cannabis on the ground that there was insufficient evidence on the second charge. Now, Razali had already twice admitted to possession, the first time orally and the second time in P3. The appellant had given various reasons for not including P3 in the investigation file as a result of which his testimony was not believed by the trial judge. I confirmed the trial judge's decision that the appellant, by deliberately not putting P3 in the investigation file had caused it to disappear in order to shield Razali. I held and continue to hold the view the word 'disappear' in the said section means 'to vanish from sight' and that the evidence, P3, disappeared at the relevant time when the appellant's superior officer made his decision whether to accept or reject the appellant's recommendation as to whether Razali should be prosecuted on one or two charges. Counsel for the appellant had submitted that P3 did not disappear as it was in his drawer all the time and that the appellant produced it immediately he was asked by the investigating CPIB officer. I did not and do not agree that this act did not make P3 'disappear'. In my view, P3 disappeared because it was locked away in a drawer. Nevertheless because it is a point on which there is no local authority and because it is a question of law on which depended the conviction of the appellant for a grave offence, I have decided to refer it for decision by the Court of Criminal Appeal.

For the above reasons, the following questions of law were on 13 December 1989 referred by me for decision by the Court of Criminal Appeal:

(1) whether in law the signed coy of the record of the trial transmitted to the appellant under s 249 of the CPC may be corrected by reference to the manuscript notes of evidence of the trial judge;

(2) whether the omission of the trial judge to explain his entry in relation to an event that never took place during the trial was sufficient by itself or in the context of the whole record to vitiate his verdict in this case;

(3) whether the trial judge had made up his mind as to the guilt of the appellant before calling on his defence and whether the trial judge had misdirected himself in

convicting the appellant on the basis that it was not for the prosecution to prove its case beyond reasonable doubt; and

(4) whether, on the evidence, the appellant had caused P3 to disappear.

Order accordingly.

Solicitors: *Amarjit Rubin & Partners.*

Reported by *Mathavan Devadas*

MALAYSIAN REPORTS

Pentadbir Tanah Daerah Gombak lwn Huat Heng (Lim Low & Sons) Sdn Bhd

MAHKAMAH AGUNG (KUALA LUMPUR) — RAYUAN SIVIL NO 01-13-1990
HASHIM YEOP A SANI HB (MALAYA), HARUN HASHIM DAN MOHAMED YUSOFF HMA
12 SEPTEMBER 1990

Undang-Undang Tanah — Pengambilan tanah — Syarat dikenakan apabila permohonan tukar syarat diluluskan — Tanah untuk projek melebarkan jalanraya — Nilai pasar tidak boleh dituntut — Akta Pengambilan Tanah 1960, Jadual pertama s 1

Perayu telah membuat rayuan atas perintah pampasan yang dikeluarkan oleh hakim Mahkamah Tinggi berkenaan dengan pengambilan tanah. Maksud pengambilan tanah tersebut ialah untuk projek melebarkan lebuhraya. Tuan tanah itu telah memohon menukar syarat tanahnya dari pertanian ke perumahan. Ini telah diluluskan dengan beberapa syarat, satunya ialah tuan tanah diminta menyerahkan kepada kerajaan tanah-tanah yang akan digunakan untuk kegunaan awam sebagaimana yang terdapat di dalam pelan pertapakan. Selepas tanah itu diambil oleh kerajaan, tuan punya tanah telah menuntut pampasan dan ini telah diberi oleh hakim yang arif di Mahkamah Tinggi. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

Tuan empunya tanah itu seharusnya tidak dibenarkan menafikan syarat yang telah dipersetujui olehnya iaitu menyerahkan tanah itu seperti terdapat di dalam plan pertapakan untuk kegunaan awam dan ia tidak boleh menuntut nilai pasar tanah itu.

[English summary

The appellant appealed against the decision of the High Court ordering compensation to be paid for land acquired by the government. The land was acquired for a project of broadening a highway. The owner of the land had earlier applied for change of condition from agriculture to building. This was approved subject to a condition that the owner should surrender any land that is to be used for a public purpose as indicated in the site plan. After the land was acquired the owner claimed compensation and this was granted by the learned judge of the High Court. The appellant appealed.

Held, allowing the appeal:

The owner should not be allowed to deny the condition which he had agreed to, that is to surrender the land as indicated on the plan for a public purpose, and he cannot claim the market value for the land.]

Undang-undang rujukan
Akta Pengambilan Tanah 1960 Jadual Pertama s 1

Rayuan daripada: Permohonan Sivil No A15-12-87 (Mahkamah Tinggi, Kuala Lumpur)

Mohd Hishamuddin bin Mohd Yunus (Penasihat Undang-Undang Negeri Selangor) bagi pihak perayu.
Harpal Singh bagi pihak responden.

Cur Adv Vult